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Nos. 85-1377, 85-1378, 85-1379

# In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

*v.*

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

UNITED STATES SENATE, APPELLANT

*v.*

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

*v.*

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP

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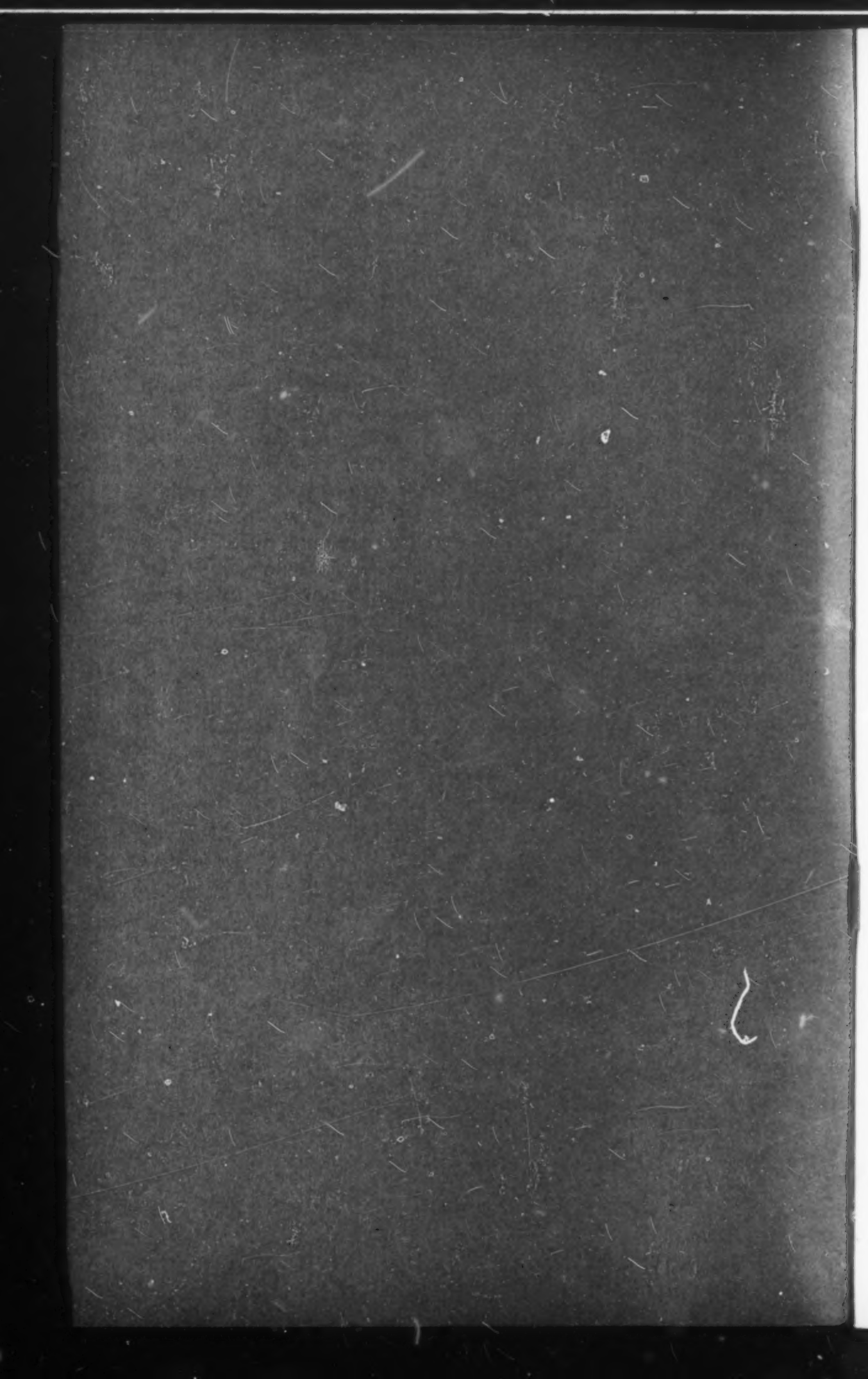

## QUESTION PRESENTED

The Balanced Budget and Emergency Deficit Control Act of 1985 requires the Comptroller General, an independent officer appointed by the President with the advice and consent of the Senate to a fixed term of office, to perform certain factfinding functions. Does the separation of powers doctrine require a declaration that the Act is unconstitutional in light of the fact that the 1921 statute creating the office of Comptroller General included language which would permit the removal of the Comptroller General by the adoption, through the regular and complete statutory enactment process, of a joint resolution?

## PARTIES IN THE DISTRICT COURT

The plaintiffs in Civil Action No. 85-3945 were Mike Synar, Gary Ackerman, Albert Bustamante, Silvio Conte, Don Edwards, Vic Fazio, Robert Garcia, John LaFalce, Jim Moody, Claude Pepper, Robert Torricelli, and James Traficant, Jr., all members of the Ninety-Ninth Congress. The plaintiff in Civil Action No. 85-4106 was the National Treasury Employees Union.

The United States was named as the defendant. The Speaker of the United States House of Representatives, Thomas P. O'Neill, Jr., and the Bipartisan Leadership Group of the House of Representatives, Jim Wright, Majority Leader; Robert Michel, Republican Leader; Thomas Foley, Majority Whip; and Trent Lott, Republican Whip, intervened as defendants. The United States Senate and the Comptroller General also intervened as defendants.

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES, INTERVENOR-APPELLANTS

### OPINION BELOW

The opinion of the district court, Joint Appendix ("J.A.") 27, has not been reported.

### JURISDICTION

The judgment of the district court was entered on February 7, 1986, J.A. 81. Probable jurisdiction was noted with regard to the jurisdictional statements of the Speaker and Bipartisan Leadership Group of the House of Representatives ("House parties"),[1] the Senate, and the

[1] The House parties are the Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives, and the Bipartisan Leadership Group of the House of Representatives—the Honorable Jim Wright, Majority Leader; the Honorable Robert H. Michel, Republican Leader; and the Honorable Thomas S. Foley, Majority Whip. The Honorable Trent Lott, Republican Whip, participated in the Group in the court below and in the jurisdictional statement, but does not join in this brief. The participation of the Speaker and Bipartisan Leadership Group has become the regular mechanism for the House of Representatives to present its institutional interest in litigation. As the conference report on the Act explains, section 274(a)(4), J.A. 163,

> also provides for intervention by the Senate and the House in such actions. It is intended that each body may employ what have developed to be the regular procedures to initiate participation in cases of institutional interest as they have in litigation concerning the 1984 Bankruptcy Act Amendments and the Competition in Contracting Act Amendments.

*Increasing the Statutory Limit on the Public Debt*, H.R. Rep. No. 433, 99th Cong., 1st Sess. 100 (1985) ("Conference Report"). *See, e.g., In re Benny*, 44 Bankr. 581 (N.D. Cal. 1984) (upholding 1984 Bankruptcy Act Amendments defended by Speaker and Bipartisan Leadership Group), *appeal argued*, Nos. 84-2805, *etc.* (9th Cir. July 10, 1985); *Ameron, Inc. v. U.S. Army Corps of Engineers*, 607 F. Supp. 962 and 610 F. Supp. 750 (D.N.J. 1985) (upholding Competition in Contracting Act defended by Speaker and Bipartisan Leadership Group), *appeals argued*, Nos. 85-5226, 85-5377 (3d Cir. Oct. 29, 1985).



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Comptroller General on February 24, 1986. This Court has jurisdiction pursuant to section 274(b) of the Balanced Budget and Emergency Deficit Control Act of 1985 ("Deficit Control Act" or "Act"), Pub. L. No. 99-177, 99 Stat. 1037, 1098-99, J.A. 163, and to 28 U.S.C. § 1252 (1982).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set forth at J.A. 103 (the Act), J.A. 93 (Budget and Accounting Act of 1921, 42 Stat. 20), J.A. 101 (31 U.S.C. § 703 (1982)), and J.A. 91 (U.S. Const., art. I and II).

## STATEMENT OF THE CASE

### A. ENACTMENT OF THE DEFICIT CONTROL ACT

The plaintiffs and the defendant United States ("Executive Branch") challenged the Act on its face immediately upon enactment, so the key facts consist of the proceedings and the reasons leading to enactment. These show why Congress, with the President's strong support, enacted the Deficit Control Act, and why the Act conferred a role upon the Comptroller General (also referred to herein as "Comptroller," "General Accounting Office", and "GAO").

In recent years, the President and Congress have faced a deficit problem of unprecedented proportions. The severity of the problem can be summed up in three analyses. David Stockman, Director of the Office of Management and Budget ("OMB") testified in 1984 as follows regarding the increasing interest on the national debt:

> On a current services basis, net interest could easily hit $160 to $180 billion in the late 1980's and I do not think there is anybody on this Committee who could think of enough taxes to raise or enough spending to cut to even offset that explosion of debt service cost. We are in the same position that

> many companies are in when they are on the eve of chapter 11.[2]

The Congressional Budget Office's ("CBO") annual budget outlook for 1985 stated that "federal debt held by the public is projected to grow from $1.3 trillion at the end of fiscal year 1985 to $2.8 trillion by the end of 1990." [3] Finally, summarizing the sense of Members of both parties and both Houses, Representative Andrews addressed both the size of the debt and its impact:

> In 4 years, the annual deficit has grown from $59 billion to $220 billion and we are faced with a national debt of over $2 trillion. This is a debt that has doubled in only four short years.
>
> These deficits . . . translate[ ] into Americans out of work and families short of the necessities of life. . . . These deficits raise our national debt which mortgages the future of our children and grandchildren.

131 Cong. Rec. H 9613 (daily ed. Nov. 1, 1985).

In the Deficit Control Act, Congress finally chose, with the President's strong support, a draconian experiment to force the problem toward solution. On September 25, 1985, various Senators introduced a bill to establish an automatic budget cut process, which required either across-the-board budget cuts, or the enactment of sufficient spending or revenue legislation to meet deficit reduction targets.[4]

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[2] I *First Concurrent Resolution on the Budget—Fiscal Year 1985: Hearings Before the Sen. Comm. on the Budget*, 98th Cong., 2d Sess. 69 (1984) (testimony of OMB Director Stockman).

[3] Congressional Budget Office, *The Economic and Budget Outlook: Fiscal Years 1986-1990: A Report to the Senate and House Committees on the Budget—Part I* xxiii (1985).

[4] The bill was S. 1702, 99th Cong., 1st Sess., 131 Cong. Rec. S 12082 (daily ed. Sept. 25, 1985). Hearings were held while the proposal was considered on the floor. *The Balanced Budget and Emergency Deficit Control Act of 1985: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. (Oct. 17, 1985) ("*Government Operations Hearings*"); *Working Toward a Balanced Budget:*

Continued

After lengthy initial floor consideration, on October 10 the Senate passed the bill, as amended, as part of a resolution raising the ceiling on the national debt to over two trillion dollars. 131 Cong. Rec. S 13114 (daily ed. Oct. 10, 1985). The Senate version required that OMB and CBO jointly issue an annual report projecting the deficit; if they determined that deficit reduction targets had not been met, the report would calculate the across-the-board budget cuts to be made by Presidential order. After a first conference,[5] which was unsuccessful, the bill shuttled back and forth between the Houses.

On November 1, the House passed its own version providing that CBO, which is nonpartisan, would make the determination, upon consultation with OMB. 131 Cong. Rec. H 9590, 9616 (daily ed. Nov. 1, 1985) (text and adoption of section 251(a), the CBO provision). The Senate responded with a second version, this time vesting the determination in GAO, 131 Cong. Rec. S 14924 (daily ed. Nov. 6, 1985). In the House, Representatives Mack and Cheney also proposed such a GAO role. The House declined, before conference, to accept their proposal, but indicated bipartisan support for the GAO role. Representatives Mack and Cheney were included as special members of the delegation to a second conference, and the House accepted their proposal for a GAO role after that second conference.[6]

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*Hearing Before the House Comm. on the Budget*, 99th Cong., 1st Sess. (Oct. 9, 1985); *The Budget Outlook and its Economic Implications: Hearings Before the House Comm. on the Budget*, 99th Cong., 1st Sess. (Oct. 10, 1985) ("*Budget Committee Hearings*").

[5] The first conference committee ended in disagreement, simply reporting back the Senate-passed ("Gramm-Rudman-Hollings") version of the Deficit Control Act. 131 Cong. Rec. H 9577-82 (daily ed. Nov. 1, 1985) (Deficit Control Act). Section 3(d)(1)(A), *id.* H 9579, was the joint OMB-CBO report provision.

[6] 131 Cong. Rec. H 9838, 9864 (daily ed. Nov. 6, 1985) (text and vote on section 204(a)(1), the Mack-Cheney GAO provision); *id.* H 9864, 9868 (offer and acceptance of motion to request a further conference); pages 20-23 *infra* (details of legislative debate). The Senate agreed to a

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The legislative history amply shows that Congress gave responsibility for the determination to an independent officer out of concern, as the district court said, about what "the House conceived to be the pro-executive bias of the OMB." J.A. 60. Chairman Rostenkowski of the House Ways and Means Committee, the floor manager and offeror of the House version, had emphasized, as did other committee chairmen,[7] the danger of vesting the determination in OMB rather than in a nonpartisan body. In response, Representative Mack offered the proposal assigning the determination to GAO, to "wall" off the determination from either the President or the Congress. Representative Gephardt signaled for the House Democrats why that proposal was ultimately going to be accepted:

> . . . A lot of our Members, both Republican and Democrat want a wall to be created that takes these decisions out of the hands of the President and the Congress, and I think a lot of Members on our side share the desire to have a wall.

131 Cong. Rec. H 9846 (daily ed. Nov. 6, 1985) (Rep. Gephardt).

As discussed in greater detail below, Representatives Mack and Cheney, the House proponents of a GAO role, relied particularly on recent court cases rejecting Department of Justice challenges to GAO's constitutionality. In those cases, contemporaneous with the legislative consideration of the Deficit Control Act, the courts had uniformly confirmed GAO's independence, rejected the

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second conference. *Id.* S 15043 (daily ed. Nov. 7, 1985); Conference Report, *supra* note 1, at 123 (conference delegation).

[7] Chairman Rostenkowski commented succinctly in support of his own amendment (which the House adopted as its version), that "[u]nder Gramm-Rudman [i.e., the first Senate version], the President could orchestrate the cuts through OMB." 131 Cong. Rec. H 9597 (daily ed. Nov. 1, 1985) (Rep. Rostenkowski); 131 Cong. Rec. H 9598 (daily ed. Nov. 1, 1985) (Chairman Brooks); *Budget Committee Hearings, supra* note 4, at 39 (Chairman Gray); *Government Operations Hearings, supra* note 4, at 82-84 (exchanges between Chairman Brooks and OMB Director Miller).

charge of Congressional control or influence, and sustained the GAO as constitutional. *Ameron, supra* note 1; *Lear Siegler, Inc., et al. v. John Lehman, et al.*, No. CV 85-1125-KN (C.D. Cal. Nov. 21, 1985) (similarly upholding that GAO role).

As ultimately adopted, the Act responds to the deficit problem with an annual deficit reduction process. Each year, pursuant to schedule, GAO reports to the President regarding whether the deficit projected under current law is above the level that would trigger the cuts, and if it is, applies the statutory formula to that deficit. Section 251(b)(1) of the Act, J.A. 116. The Directors of OMB and CBO furnish GAO with an advisory report about the deficit projection and formula-based cuts. GAO is to "review and consider" this report and to give it "due regard," but is not bound by it. Section 251(b)(1), J.A. 116.[8]

If the deficit is projected above the accepted level, the President issues a sequestration order making the cuts. Section 252(a)(1), J.A. 124. That procedure has already been followed for the current fiscal year on an expedited schedule set forth in the Act, as discussed in the Senate's brief.

### B. THE DISTRICT COURT DECISION

Immediately after the President signed the Act into law, Representative Mike Synar and the other plaintiffs invoked the Act's judicial review provision and filed suit to challenge the Act on its face, primarily on delegation grounds. The Department of Justice appeared in the name of the United States, representing the interests of the Executive Branch. The Executive devoted most of its effort to repeating the challenges to the GAO it had previously presented unsuccessfully in *Ameron* and *Lear*

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[8] The legislative history reinforces that the ultimate report rests on independent GAO determinations, rather than on the advice of the Congressional or Presidential budget offices. *See* Conference Report, *supra* note 1, at 84 (Comptroller General expected to perform "independent analysis" and to "monitor all relevant data on an on-going basis").

*Siegler*. However, the Executive did defend the Act against plaintiffs' delegation challenge.

The Senate and House parties intervened to defend the Act against the Executive's challenge, a procedure approved by this Court, *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 940 (1983), and the Comptroller General also intervened to defend. The House parties have addressed only the challenge to the GAO and have taken no position on the delegation issue. A three-judge district court heard argument on dispositive cross-motions.

After passing upon threshold objections and upholding the Act against the delegation challenge, the court struck down the Act because of the GAO's role.[9] First, the district court analyzed the GAO's function of projecting the deficit, applying the statutory formula to that deficit, and issuing its determination thereupon. The court concluded that this was not a function within the rule of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), authorizing performance of quasi-legislative, quasi-judicial, and incidental functions by independent agencies. Its opinion fairly characterized GAO's function as "the interpretation of the law," and "the exercise of substantial judgment concerning present and future facts that affect the application of the law," J.A. 72. Although independent agencies have always performed those functions, the district court deemed such functions to be "normally . . . executive" and "executive functions." J.A. 72, 75.

The Executive Branch's main thrust was a sweeping assault on the GAO's independent performance of its traditional functions and on the viability of *Humphrey's Executor*. Only three years ago, this Court described GAO as

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[9] Plaintiffs argued that GAO's role would not be what the Act prescribed—that GAO would just " 'rubber-stamp' " a decision by others instead of making its own independent decision; after receiving extensive treatments of the legislative history and an uncontested affidavit by the Comptroller General showing the contrary, the district court rejected that argument out of hand as "unconvincing." J.A. 55 n.18

an "independent agency," *Bowsher v. Merck & Co.*, 460 U.S. 824, 844 (1983), and as noted above, two courts have recently applied the *Humphrey's Executor* rule to sustain the GAO. The district court did not deem *Bowsher* or these two rulings worthy of discussion. Instead, the court brushed these key precedents off in a footnote with *"see, e.g."* and *"but cf."* citations. J.A. 72 n.9. The court then claimed that it was "difficult to reconcile *Humphrey's Executor's* 'headless fourth branch' with a constitutional text and tradition establishing three branches of government," J.A. 69, and characterized that decision of this Court as "stamped with some of the political science preconceptions characteristic of its era and not of the present day," J.A. 68. It entered an order striking down this Act because of the GAO role, and appellants sought review by this Court.

## SUMMARY OF ARGUMENT

The political Branches, after extensive debate, devised this Act as an experimental response to a major national problem. In addressing the facial challenge to this Act, the Court should adhere to its consistent approach in separation of powers cases: avoiding the "archaic" view of a rigid framework, particularly where, as here, the challenged Act does not run afoul of any specific constitutional prohibitions.

In this Act, the GAO's pertinent functions are clear: projecting the deficit and applying the statutory formula to that deficit, thereby calculating the cuts to be made. The district court fairly characterized the functions as "interpretation of the law" and "application of the law" to the facts. J.A. 72. Established constitutional law leaves no doubt that, assuming a proper delegation, the President and Congress may decide to "wall" off such calculations from politics by assigning them to an independent agency. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Buckley v. Valeo*, 424 U.S. 1, 141 (1976). The history of the independent Federal Reserve Board amply supports such a role for an independent agency.

The Executive Branch's main separation of powers challenge is not about whether these functions could be vested in an independent agency; rather, the Executive directs its assault to *Humphrey's Executor* and the performance of traditional functions by an independent Comptroller. Article I, sec. 9, cl. 7, J.A. 91, providing that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," incorporates into the Constitution the historic power of the purse, with its necessity for an independent comptroller as a check on the Executive. British, state, and federal history contemporaneous with the Constitutional Convention show that the Framers deeply understood that necessity. As the Court observed in *Humphrey's Executor,* 295 U.S. at 631, during the First Congress when the "Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply." *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 162, 167 (1803) (officers with fixed terms performing quasi-judicial functions not removable).

The 1921 budget statute reacted against the President's use of removal threats to obtain the Comptroller's subservience. That law allowed the President to appoint the Comptroller, subject to Senate confirmation, to a fifteen-year term, but included a number of measures to secure the Comptroller's independence, including freedom from Presidential removal at will. While *Myers v. United States,* 272 U.S. 52, 135 (1926), suggested that quasi-judicial and quasi-legislative officers, such as the Comptroller, were removable at will, *Humphrey's Executor* overruled it on that specific point, 295 U.S. at 629. Much as this Court recently recognized with perfectly consistency that "[t]he GAO is an independent agency within the legislative branch," *Bowsher v. Merck & Co.,* 460 U.S. at 844, so the *Humphrey's Executor* Court recognized that the

FTC performs its functions independently as an "agency of the legislative . . . department [ ] of government." 295 U.S. at 628. *Buckley v. Valeo*, and fifty years of legislative consideration, have confirmed the soundness of the rule of *Humphrey's Executor*.

The contention common to the Executive Branch's challenges to the GAO in *Lear Siegler*, *Ameron*, and this case, is that the GAO cannot be an "independent agency" because the Houses of Congress allegedly control it. In each instance, the Executive relies heavily on the provision for removal of the Comptroller General by public law. The Executive challenge is without merit. The President appoints the Comptroller General, as President Reagan appointed the current Comptroller, Charles A. Bowsher. Repeatedly, the courts have found that the GAO functions freely and independently without Congressional control or influence.

The sixty-five-year-old removability provision soundly and constitutionally requires, in order to remove the Comptroller General before the end of his fifteen-year term, the full application of the legal power of the President and the Congress through enactment of a public law. As such, it is not inconsistent with any provision of the Constitution. The Comptroller General, in law and in practice, serves the nation as an independent officer, subservient to neither the Congress nor the Executive. Thus, the determination by the political branches to utilize his unique independence as an important element in this historic effort to address a national problem of considerable scope should not be disturbed by this Court.

## ARGUMENT

### I.

### THE FUNCTIONS ASSIGNED BY THE DEFICIT CONTROL ACT ARE SUITABLE FOR AN INDEPENDENT OFFICER

This Act makes the challenged functions assigned to the GAO quite clear. In the district court's words:

> Under subsection 251(b)(1), the Comptroller General must specify levels of anticipated revenue and expenditure that determine the gross amount which must be sequestered; and he must specify which particular budget items are required to be reduced . . . and in what particular amounts.

J.A. 72. There is little dispute over the calculations to be performed by GAO: projecting the deficit, and applying the statutory formula to that deficit, thereby calculating the cuts.

Nevertheless, the challengers of the Act made strained arguments about the functions, which the district court accepted:

> The first of these specifications require the exercise of substantial judgment concerning present and future facts, that affect the *application of the law*—the sort of power normally conferred upon the executive officer charged with implementing a statute. The second specification requires an *interpretation of the law* enacted by Congress, similarly a power normally committed initially to the Executive . . . . In our view, these cannot be regarded as anything but executive powers in the constitutional sense.

*Id.* 72-73 (emphasis supplied). Based on this analysis, the district court apparently concluded that the functions could not be performed by an independent agency.[10]

In light of this Court's repeated pronouncements, from 1935 to 1976, confirming that independent agencies can

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[10] The district court is somewhat vague on this point, but it cited two descriptions in *Humphrey's Executor* of the functions that can be performed by independent agencies, J.A. 71 (citing *Humphrey's Executor*, 295 U.S. at 628), and concluded that "[t]he Comptroller General's powers under the automatic deficit reduction process, however, do not come within that category," *id. Compare* J.A. 80 ("our holding today reaffirms [Congress] must [leave such decisions] to an officer within the control of the executive branch") *with* J.A. 60 (contending that whether "validation of [the Comptroller General's] functions under this legislation might constitutionally require" that he be "removable . . . at the discretion of the President, like the Director of the OMB himself" is "a point we do not reach").

perform their traditional functions, the challengers' claim that no independent agency could perform "interpretation of the law" and "application of the law" is transparently incorrect. For example, in *Buckley v. Valeo*, this Court applied a functional analysis that permitted independent agencies to perform their traditional functions:

> All aspects of the Act are brought within the Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibiity for funds and even for federal elective office itself. These functions . . . are of kinds usually performed by independent regulatory agencies or by some department. . . . [E]ach of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law. . . . [T]he president may not insist that such functions be delegated to an appointee of his removable at will, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). . . .

*Id.* at 140–141 (footnote omitted); *accord, Wiener v. United States*, 357 U.S. 349 (1958).

Patently, "interpretation of the law" and "application of the law" to facts, GAO's functions in this Act, are the heart of the functions performed every day for the past century and longer by independent regulatory commissions and their precursors. Such functions are precisely what the FTC did in *Humphrey's Executor*, the War Claims Commission did in *Wiener*, and the Federal Election Commission (upon cure of the appointments problem) did in *Buckley*. By contrast, they do not constitute the purely executive functions discussed in *Myers* which do not require independence.

If, for example, Congress directed an independent board with jurisdiction over natural gas rates or federal pensions to apply statutory formulae to projections about next year's rates or pension costs, and to direct adjustments in those rates or pensions, it is difficult to imagine that this would be deemed a violation of the separation of powers because the board was independent. Yet that is

apparently how the challengers would rewrite the Constitution.

In fact, Circuit Judge Scalia, at argument, put the matter best when he analogized the functions in the current Act to a host of traditional independent agency functions:

> What about rate regulation, Mr. Morrison? . . . . If you take all of the federal rate-making agencies that make judgments as to what prices power companies can charge next year, what transportation companies can charge next year and so forth, large segments of the economy, they make all of those judgments on the basis of precisely the kind of predictions you are talking about here, what will the inflation rate be, how will the economy be, how much electricity will be used.

Transcript of *Synar* v. *United States*, Jan. 10, 1986, at 15–16.[11]

In its opinion, the district court concluded that

> [i]f the facts and predictions here are difficult to ascertain, they are no more so than many others committed to the charge of administrative officials, such as the complex economic calculations required of the agencies that determine the discount rate. . . . The Comptroller General is not made responsible for a single *policy* judgment. . . .

J.A. 51. The "discount rate" referred to is also set by an independent agency, the Federal Reserve Board.

In short, assuming the validity of the delegation, there can be no dispute that assignment of traditional functions to an independent agency is proper. Of course, there was a major debatable question—for the political Branches—as to the soundness of assigning the calculations on the scale of this Act to an independent agency. Still, such an assignment was not unprecedented; the Federal Reserve

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[11] The activities referred to are activities of independent agencies, such as the Federal Energy Regulatory Commission (ratemaking for power companies), the Interstate Commerce Commission and the Federal Maritime Commission (transportation rates).

Board, the nation's central bank, has been an independent agency with a scale of responsibility far beyond this Act, considering that the Board, independent since 1935, does not merely apply statutory formulae to projections, but makes national monetary *policy, see, e.g.,* T. Phalle, *The Federal Reserve: An Intentional Mystery* xxiii (1985). The challengers have never offered an iota of persuasive argument for why the Judiciary should constitutionalize the question of such assignments, particularly where, as the district court found, the task involves no policy judgments. J.A. 51. The rule of *Humphrey's Executor* allowed the political Branches to decide, for the sound reasons discussed in the legislative history above, to "wall" off these calculations from political control.

## II.

### THIS COURT HAS REJECTED THE "ARCHAIC" VIEW OF SEPARATION OF POWERS

In addressing the Executive's challenge to the GAO's performance of independent agency functions, the Court should adhere to its consistent approach to separation of powers cases. The Court has rejected the "archaic" view of a rigidly divided framework, particularly where, as here, the challenged Act does not run afoul of any specific constitutional prohibition. The separation of powers challenge to the constitutionality of the GAO's performing the calculations is a highly technical attack on one very limited, but vital, aspect of the Act. Moreover, that challenged aspect was, in many respects, the least controversial aspect of the Act during its legislative consideration from either a policy or constitutional standpoint.

The Deficit Control Act constitutes a bold experiment in fiscal control. It responds to one of the most intractable and drastic problems facing the nation today: a spiraling deficit feeding itself through interest on its own accumulation. Dealing with such problems is the peculiar responsibility of the political Branches in the enactment of statutes and the development of the budget, rather than

of the life-tenured Branch. At least since Justice Brandeis' eloquent plea that legislatures be allowed to engage in "experimentation," [12] the Court has recognized the latitude it should allow to necessary legislative innovation in matters of political responsibility—particularly where, as here, no civil liberties or individual rights are impaired by basically economic legislation.

When this Court set forth its fullest treatment of the standard for separation of powers, in *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977), it rejected the "'archaic view of the separation of powers as requiring three airtight departments of government.'" *Id.* at 443. In determining whether a statute disrupts the balance between the coordinate branches, the proper inquiry focuses on the extent to which the Act "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* [13] The "Court has thus been mindful that the boundaries between each branch should be fixed 'according to common sense and the inherent necessities of the governmental co-ordination,'" *Chadha,* 463 U.S. at 962 (Powell, J., concurring) (quoting *J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 406 (1928)).

The Court has noted that a "hermetic sealing of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo,* 424 U.S. at 121. "Rather, as Justice Jackson wrote: 'While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed

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[12] *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also Chandler v. Florida,* 449 U.S. 560, 579 (1981); *Reeves, Inc. v. Stake,* 447 U.S. 429, 441 (1980); *Whalen v. Roe,* 429 U.S. 589, 597 & n.20 (1977).

[13] Moreover, even "where the potential for disruption is present," the court may reach the conclusion that "that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Id.; see also Nixon v. Fitzgerald,* 457 U.S. 731, 754 (1982).

powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.' " *Chadha,* 462 U.S. at 962 (Powell, J., concurring), (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (concurring opinion)).

This Court's rejection of the "archaic view" tracks the pronouncements of the Framers. If the three branches of government were rigidly and archaically separated, checking and balancing by means such as an independent Comptroller would be impossible. When the idea of a rigidly pure separation was suggested to the Framers and debated by them, they consciously rejected it as impractical and unreasonable.[14] Recent commentators have emphasized that "[b]y the time of the Philadelphia convention the doctrine of separated powers had been modified to allow for checks and balances."[15] As Madison explained, checks and balances did not mean "that these departments ought to have no *partial agency* in, or *controul* over the acts of each other." *Id.* at 325 (emphasis in original). Rather, "the whole power of one department [should not be] exercised by the same hands which possess the whole power of another department." *The Federalist,* No. 47, at 325–26 (J. Madison) (J. Cooke ed. 1961) (quoting Montesquieu). Madison's view accorded the Branches "a degree of interdependence." [16]

This is especially true in a case such as this where the challenged Act does not run afoul of any specific constitutional prohibition. In other recent separation of powers cases, the challengers to the enacted statutes were not required to make highly strained attacks, but could point to specific textual constitutional prohibitions. This Court required the challengers to rebut the "presumption that the challenged statute is valid." *Chadha,* 462 U.S. at 944. *See*

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[14] *See The Federalist,* No. 51 (J. Madison) (J. Cooke ed. 1961).

[15] L. Fisher, *Constitutional Conflicts Between Congress and the President* 14 (1985).

[16] Levi, *Some Aspects of Separation of Powers,* 76 Colum. L. Rev. 371, 378 (1976).

*also Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). To overcome this presumption of validity, which serves as an important safeguard assuring that those selected by the American people to set national policy can, in fact, do so, this Court relied on "[e]xplicit and unambiguous provisions of the Constitution . . . ." *Chadha*, 462 U.S. at 944.

In *Chadha* and the two other recent occasions, *Buckley v. Valeo* and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), where this Court was required to reject as unconstitutional, on separation of powers grounds, the policy determinations made by the political branches, the Court was faced with crystalline direction from the Constitutional Convention rather than the textual silence found here.[17]

No specific constitutional provision bars this Act. Instead, the challengers rely on attenuated inferences from a mixture of various clauses, none of which directly addresses this Act. With respect to the Appointments Clause, art. II, sec. 2, cl. 2, J.A. 92, the President, with the advice and consent of the Senate, properly appoints the Comptroller General. The challengers claim to find implied restrictions in that Clause which control this case, regarding removal, rather than appointment, but their argument is strained. This Court has repeatedly held that the interpretive maxim that treats "removal as incident to the power of appointment, unless otherwise

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[17] In *Chadha*, the Court noted that the requirements of bicameralism and presentation to the President, the explicit constitutional provisions found to be violated, "were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented." *Chadha*, 462 U.S. at 946–47. *Buckley v. Valeo*, 424 U.S. at 124, recognized that the Court's separation of powers analysis was to be undertaken "in the context of these cognate provisions of the document . . . ." With similar adherence to requirements explicitly found within the four corners of the Constitution's text, the plurality opinion in *Marathon*, 458 U.S. at 58, found the Bankruptcy Act of 1978 constitutionally infirm in that it transgressed an "unambiguously enunciate[d] . . . . fundamental principle" found in the text of Article III.

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provided," *Reagan v. United States*, 182 U.S. 419, 426 (1901), as applied to the Appointments Clause, simply does not by itself prohibit Congress from defining removability as it enacts the laws creating and defining all offices not provided for in the Constitution. In fact, *Myers* itself emphasized that the Appointments Clause does not control removals.[18]

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[18] *Myers* recites the maxim quoted above from *Reagan v. United States*, with the same limitation that it applies "[i]n the absence of any specific provision to the contrary," *Myers*, 272 U.S. at 26.

The Appointments Clause includes two specific provisos: Senate participation in appointments and Congressional authority to specify alternative appointment methods for inferior officers. Each of these provisos has contributed to the Court's reluctance to find a removal power in the express language of the Appointments Clause. In *Myers*, the Court recognized that the laws creating Mr. Myers' office could require Senate participation in the appointment of Mr. Myers. With the appointment mechanism including the Senate, to infer a removal mechanism directly from that appointment mechanism would have approved a Senate role. As the Court asked:

> Under section 2 of Article II, however, the power of appointment by the Executive is restricted in its exercise by the provision that the Senate, a part of the legislative branch of the Government, may check the action of the Executive by rejecting the officers he selects. Does this make the Senate part of the removing power?

272 U.S. at 119. To avoid this parallel, the opinion strongly distinguished the Appointments Clause's provisions for appointments from removal. "The history of the [Appointments] clause . . . makes it clear that it was not prompted by any desire to limit removals," *Myers*, 272 U.S. at 119; *id.* at 121 ("the power of removal . . . . is different in its nature from that of appointment").

The other proviso, regarding Congressional specification of alternative appointment methods for inferior officers, has discouraged linkage of any Presidential power to remove at will with express language of the Appointment Clause even further. *United States v. Perkins*, 116 U.S. 483, 385 (1886); page 47 *infra*.

*Myers* has some loose expressions about the Appointments Clause that, if read too broadly apart from the more careful treatment noted above, would serve in an argument that the President can remove judges and quasi-judicial officers at will. However, that reading would directly contradict both *Marbury v. Madison* and *Humphrey's Executor*, as discussed below, and thus is not the law.

Similarly, the generally-worded "executive Power" and "faithful execution" clauses also do not amount to constitutional bars to this Act or to the independent performance of the traditional comptroller function. The former clause simply states that the "executive Power shall be vested in a President of the United States of America." U.S. Const., art. II, sec. 1, cl. 1, J.A. 92. As Justice Jackson explained:

> If [the clause granted such powers,] it is difficult to see why the forefathers bothered to add several specific items [to Article II], including some trifling ones.
>
> The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. . . . I cannot accept the view that this clause is a grant in bulk of all conceivable executive power. . . .

*Youngstown*, 343 U.S. at 640–41 (Jackson, J., concurring).

The Constitution's requirement that the Executive shall "take Care that the Laws be faithfully executed," U.S. Const., art. II, sec. 3, J.A. 92 does not constitute a positive sweeping grant of power for the President to take over the independent agencies, but a limit on what the Executive may do with its own powers.[19]

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[19] *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838); *Youngstown*, 343 U.S. at 587 (majority opinion);

> The nature of that [faithful execution] authority has for me been comprehensively indicated by Mr. Justice Holmes. "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his powers."

*Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) (citation omitted); *id.* at 646 (Jackson, J., concurring); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974).

The "faithful execution" clause took its inspiration from the English Bill of Rights, enacted after the Stuart Monarch James II was forced

Continued

## III.

### THE RULE OF *HUMPHREY'S EXECUTOR* IS VALID AND MAKES THE COMPTROLLER GENERAL AN INDEPENDENT OFFICER

#### A. This act's reason for the GAO role

Although the district court disagreed with the House parties' constitutional conclusions, it conceded the correctness of the legislative history which "the brief of Intervenor Speaker and Bipartisan Leadership Group of the House meticulously details . . . ." J.A. 60. The House floor debate constituted a vigorous and hard-fought battle over this bill before enactment; it illuminates the GAO role better than any abstract analysis can do.

Originally, the Deficit Control Act came from the Senate, in a first version which gave authority to the Presidential and Congressional budget offices; this version was heavily criticized in the House for assigning the key calculations to those offices. See note 7 *supra*. As an alternative, the present GAO role was proposed to the House by Representatives Mack and Cheney, who both

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into exile by the Glorious Revolution of 1688. A major provision of the English Bill of Rights declared "that the pretended power of suspending of laws, or the execution of laws by regall authority, without consent of Parlyament, is illegall." 1 W. & M., sess. 2, ch. 2 (1688).

> "Scholars have concluded that the 'faithful execution' clause of our constitution is a mirror of the English Bill of Rights' abolition of the suspending power [,] that is, the abolition of what the English Bill of Rights had called 'the pretended (Royal) power of suspending' " [the execution of laws.]

*Ameron, Inc. v. U.S. Army Corps of Engineers*, 610 F. Supp. at 755 (quotation omitted). *See The President's Suspension of the Competition in Contracting Act is Unconstitutional:* H.R. Rep. No. 138, 99th Cong., 1st Sess. 10 (1985); *Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 263–67 (1985); *Department of Justice Authorization and Oversight, 1981: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 885–87 (1980); Reinstein, *An Early View of Executive Powers and Privileges: Trial of Smith and Ogden*, 2 Hastings Const. L.Q. 309, 321 (1975)); Stewart, *The Trial of the Seven Bishops*, Cal. St. B.J., Feb. 1980, at 70 (account of the 1688 case underlying the provision).

served as special conferees at large on the conference committee that incorporated the GAO role. Conference Report, *supra* note 1, at 123.

Representative Gephardt, a leading figure in the budget debate, made the chief response for the House Democrats. While he indicated disagreement with some aspects of the Mack-Cheney proposal, he signaled bipartisan support for the GAO role. He did not do so through any contention that Congress would influence or control the GAO, something no Member believed or desired. Rather, he analyzed the GAO role as something more than a mere check on political influence—it was, he said, an absolute "wall," and later Representative Mack emphasized the strength of that wall.[20] In Representative Gephardt's key statement, he made unmistakably clear that the wall Members sought would not merely bar the President, but would take "these decisions *out of the hands of* the President and *the Congress.*" 131 Cong. Rec. H 9846 (daily ed. Nov. 6, 1985) (Rep. Gephardt) (emphasis supplied).[21]

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[20] 131 Cong. Rec. H 11883 (daily ed. Dec. 11, 1985) (Rep. Mack) (statement in support of conference report).

[21] For the place of the Mack-Cheney amendment in the enactment sequence, see page 4 *supra*. Representative Gephardt was the Democratic manager on that amendment. 131 Cong. Rec. H 9844 (daily ed. Nov. 6, 1985) (recognition of Rep. Gephardt for half the time on the amendment). In Representative Gephardt's key statement, he offered to negotiate in a second conference on the first two aspects of the Mack-Cheney amendment ("we are willing to negotiate about th[e] [first] difference," and the second is "one again that we are willing seriously to negotiate about," *id.* H 9846). Then he addressed the GAO role, and he signaled why the House would ultimately accept it after conference, *id.*:

> I feel very strongly that we have a conflict in this proposal. We have two priorities: A lot of our Members, both Republican and Democrat want a wall to be created that takes these decisions out of the hands of the President and the Congress, and I think a lot of Members on our side share the desire to have a wall.

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Just as Representative Gephardt, Chairman of the House Democratic Caucus, analyzed the proposal for his side, so Representative Cheney, chairman of the Republican Policy Committee and an elected leadership officer of the House Republican Party, and a leading figure in the budget debate, analyzed it for that side. In his closing speech on the amendment, Representative Cheney explained why "[w]e have included GAO"; the decision was "based upon the work that the American Law Division has done at the Library of Congress." 131 Cong. Rec. H 9864 (daily ed. Nov. 6, 1985). That statement referred to the American Law Division's analyses of GAO published in connection with the highly visible federal court cases sustaining GAO as an independent agency.[22] Both the Senate and the House parties participated in those cases, which were contemporaneous with the Deficit Control Act debate, and which were also the subject of published committee reports. H.R. Rep. No. 138, *supra* note 19 (Committee on Government Operations); H.R. Rep. No. 113, 99th Cong., 1st Sess. 11–18 (1985) (Committee on the Judiciary).

Not a single statement by *any* Member of Congress—not even a single statement by any of the hundreds of opponents of the Act, many of whom made lengthy and in-

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> However . . . . we need to have that negotiation, and I think it is clearly unacceptable to go back to the Gramm-Rudman procedure, which allows OMB and CBO to make the arbitration. . . [because] we will wind up with OMB being the final arbiter. . . .

[22] Representative Cheney's statement was:

> We have wrestled with the constitutional questions. We have included GAO.
>
> I am personally convinced, based upon the work that the American Law Division has done at the Library of Congress, that this is indeed a constitutional package.

131 Cong. Rec. H 9864 (daily ed. Nov. 6, 1985). *See Constitutionality of GAO's Bid Protest Function*, *supra* note 19, at 646–70 (reprinting lengthy American Law Division analysis of GAO).

tensive critiques [23]—disputed the bipartisan conclusion of Representatives Gephardt and Cheney that the GAO role would "wall" off the calculations from influence by the President *and the Congress.* In fact, the many critics of the bill noted the "unelected" [24] status of GAO, emphasizing that GAO's role meant that the elected Congress would not conduct or control the process.

Even the Executive Branch never claimed during the Act's legislative consideration (in contrast to its post-hoc position for litigation purposes) that the GAO's role would be controlled by Congress.[25] On the contrary, the Executive made a series of strong endorsements of the Act, to which the proponents of the Mack-Cheney proposal referred explicitly. Never once during the legislative consideration were these endorsements tempered by any

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[23] *See, e.g.,* 131 Cong. Rec. S 17404-06 (daily ed. Dec. 11, 1985) (lengthy critique by Sen. Glenn); *id.* H 11884-85 (Rep. Scheuer) (same); *id.* H 11885-86 (Rep. Rodino) (same).

[24] *See, e.g.* 131 Cong. Rec. H 11885 (daily ed. Dec. 11, 1985) (Rep. Scheuer) (noting GAO as "unelected"); *id.* H 11888 (Rep. Waxman) (same); *id.* H 11888 (Rep. Conte) (same); *id.* H 11901 (Rep. Mineta) (same).

[25] Early on, when the Director of OMB was repeatedly pressed during hearings to discuss constitutional concerns, he explained that the President strongly endorsed the bill, that the Administration had not produced any writings at all on the subject, and that there were some concerns about CBO—not GAO—which should be taken care of by a severability clause. *Government Operations Hearings, supra* note 4, at 100-02 (exchange between Rep. Synar and OMB Director Miller).

During the entire critical month of November, after the Senate adopted a GAO role in its second version, and as the conference committee worked on the proposal for a GAO role, when the President's support was absolutely crucial to the progress of the legislation, the Executive did not issue a single statement questioning GAO's role in this Act. Had there been any, opponents would have emphasized it heavily. See note 24 *supra* (lengthy critiques without intimation of any such Executive questioning).

Later, when the President signed the bill into law, he issued a post-hoc signing statement questioning GAO.

statement on the public record questioning the constitutionality of a GAO role in this Act.[26]

On this record, it is astonishing that the challengers attempt to invoke *Chadha* and *Buckley,* where Congress expressly exercised control over agencies through legislative vetoes and appointment of officers, to depict this Act as a Congressional scheme to take control. In sum, the record shows that during the months of consideration of this matter, not one Member of Congress, whether supporter or opponent, and not one Executive spokesman, contended that Congress would control GAO or that a GAO role was unconstitutional. Not one disputed the proponents' view that GAO's role would "wall" off Congress.

**B. The appropriateness of independence for the Comptroller function and the soundness of *Humphrey's Executor***

The House parties will return later, after laying a proper historical predicate, to the incorrect charge that Congress controls the Comptroller General's calculations for this Act. However, first the challenge to whether *Humphrey's Executor* is good law, and to whether it sustains the Comptroller General's exercise of his traditional functions, should be addressed. The Executive Branch has attacked the GAO based on criticisms of *Humphrey's Executor* as a figment of 1930's "political science preconceptions." J.A. 68. Of course, even the district court drew back from "disregarding the rationale," J.A. 70, of so fundamental a precedent for the structure of the government as the unanimous decision in *Humphrey's Executor.* However, the Executive has not drawn back from such an assault.

The Executive's direct assault calls for a recapitulation of the powerful weight of constitutional history sustaining *Humphrey's Executor* and the Comptroller's independence in the performance of his traditional functions.

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[26] *See, e.g.,* 131 Cong. Rec. H 11879 (daily ed. Dec. 11, 1985) (Rep. Cheney) ("let me begin my remarks by reminding . . . that the conference report that is before us tonight has the support of the President. He has endorsed it . . . ."); *id.* (Rep. Martin).

1. The Constitutional History of Independence For the Comptroller

The Comptroller's history long foreshadowed his central importance today as an independent check on Executive impoundments and procurement. The Constitution's strict commandment of the power of the purse, that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. Const., art. I, sec. 9, cl. 7, J.A. 91, implied the necessity for an independent check on the Executive, as the Framers knew well from the historic struggles by the House of Commons and colonial legislatures to confine the Executive to duly appropriated expenditures.

History taught the Framers the vital need for an independent comptroller's quasi-judicial balance—both between the Executive and the individual, as described in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 277–80 (1856), and between the Executive's desires and the power of the purse. As the Framers knew, in 1785—just two years before the Constitutional Convention—the great Edmund Burke and William Pitt had culminated a century of reform in Parliament's power of the purse. They had established independent commissioners to exercise the comptroller function, who held office with tenure like judges, appointed by the Executive (the Crown) but made independent by not being removable during good behavior.[27]

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[27] An Act for better examining and auditing the Publick Accounts of this Kingdom, 25 Geo. III, ch. 52 (1785) (revising a 1780 act, and providing for officers who "shall be stiled, *The Commissioners for auditing the Publick Accounts*, and shall hold their officers *quam diu se bene gesserint*" (emphasis in original) (even using the same Latin term that protected the tenure of the British predecessors of the Article III judge, *see United States v. Will*, 449 U.S. 200, 218 (1980)).

*See* H. Roseveare, *The Treasury 1660–1870* 53, 56, 59, 61 (1973) (evolution in 1600s and 1700s); *see id.* 62–63 (1785 act). Specifically, on the eve of the Philadelphia Convention, the Framers saw the meaning in Britain of the power of the purse when they watched the creation:

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The creation of independent commissioners was a key step in the evolution of Britain's modern independent Comptroller and Auditor General, of independent comptrollers throughout the world, and of our own Comptroller.[28] Similarly, in 1781 the Continental Congress insisted on an independent quasi-judicial Comptroller removable only for cause.[29] On the eve of the Philadelphia conven-

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> in 1785 [of] a board of five members, whose status was made as independent as possible of the executive. They were appointed by the Crown under the authority of Parliament and held office during good behavior. Here was a real provision for a regular audit. . . .

B. Chubb, *The Control of Public Expenditure* 19 (1952) (footnote omitted).

[28] *See* R. Berger, *Executive Privilege: A Constitutional Myth* 113 (1974) (tracing Constitution's provision regarding power of the purse to British roots); McGuire, *Legislative or Executive Control Over Accounting for Federal Funds*, 20 Ill. L. Rev. 455, 466–68 (1926) (tracing Comptroller General removability provision to same roots).

*See, e.g.*, the law in Britain, Australia, Canada, India, Ireland, Jamaica, and New Zealand: Exchequer and Audit Departments Act of 1866, 29 & 30 Vict., ch. 39, § 3 (as amended) (the "Comptroller and Auditor General . . . shall hold [his] office[] during good behaviour"); Audit Act of 1901 (as amended), § 7(1), Austl. Acts P. ("The Auditor-General shall hold his office during good behaviour. . . ."); Auditor General Act, Ch. 34, § 3 (1), 1976–77 Can. Stat. 931 ("the Auditor General of Canada [is] to hold office during good behaviour for a term of ten years"); India Const., art. 148(1) ("There shall be a Comptroller and Auditor-General of India who . . . shall only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court"); Ireland Const., art. 63 ("[T]he Comptroller and Auditor General shall not be removed from office except for stated misbehaviour or incapacity"); Jamaica (Constitution) § 121(3), as reprinted in XX Jam. Rev. Laws 142 (1980) ("The Auditor-General may be removed from office only for inability to discharge the functions . . . or for misbehaviour"); Public Finance Act, No. 65, § 20, 1977 N.Z. Stat. 646 ("the Controller and Auditor-General may be removed or suspended from his office only . . . for disability, bankruptcy, neglect of duty, or misconduct").

[29] In 1781, as Robert Morris became Superintendent of Finance, "the officers of the treasury were to be an assistant superintendent, a comptroller," and others, C.J. Bullock, *The Finances of the United*

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tion, a number of the new states had established comptrollers to pass on government claims or disbursements; today, every state has a Comptroller or Auditor, and most are independent from executive (gubernatorial) will.[30] In sum, British, state, and federal history all show that to the Framers, as to the English-speaking world today, the Article I power of the purse necessarily implied a comptroller performing his traditional functions independent of the Executive will.

The Framers revealed most clearly their constitutional understanding when James Madison discussed, in the First Congress, the structure for Treasury operations. When the Congress convened in New York in 1789, Madison argued successfully, as the living voice of the Philadelphia convention two years earlier, on the one hand, that an officer such as the Secretary of Foreign Affairs should be responsible solely to the President's will, and hence subject to removal at will. *See Myers v. United States,* 272 U.S. at 111–31. On the other hand, when the

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*States from 1775 to 1789* 201 (1985 ed. reprinted 1979); L.M. Short, *The Development of National Administrative Organization in the United States* 67 (1923). The committee reporting Treasury legislation specified that removal by the superintendent of subordinates would be "for incapacity, negligence, dishonesty or other misbehaviour," XIX J. Continental Cong. 432 (1912 ed.) (entry of Apr. 21, 1781). As provided by "An Ordinance for Regulating the Treasury, And Adjusting the Public Accounts," enacted Sept. 11, 1781, XXI J. Continental Cong. 948–49 (1912 ed.):

> When an account is audited . . . it shall be reported to the comptroller, and any person who shall think himself aggrieved by the judgment of the auditor, shall have a privilege of appealing, within fourteen days, to the comptroller. In all such appeals the comptroller shall openly and publicly hear the parties, and his decision shall be conclusive.

[30] *Merchants' Warehouse Co. v. Gelder,* 349 Pa. 1, 36 A.2d 444, 450 n. 7 (1944) (quoting 1782 and 1785 Pennsylvania acts); *Commonwealth v. Pierce's Administrator,* 25 Va. (4 Rand.) 432 (1826) (quoting early Virginia acts); *Dowe v. Egan,* 48 A.2d 735, 740 (Conn. 1946) (quoting 1786 Connecticut act). The provisions today are collected in *Constitutionality of GAO's Bid Protest Function, supra* note 19, at 465–85 (1985) (reprinting study by Duncan Hollomon, Congressional Research Service).

First Congress took up the Treasury a week later, Madison distinguished the Comptroller's function as entirely different. As the Supreme Court later noted:

> [when] the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, *a different rule in respect of executive removal might well apply.* 1 Annals of Congress, cols. 611–612.

*Humphrey's Executor*, 295 U.S. at 631 (emphasis supplied).

Specifically, Madison explained the need for "the independent officers of Comptroller and Auditor." 1 Annals of Cong. 393 (J. Gales ed. 1789). Madison elaborated, respecting the tenure by which the Comptroller was to hold his office:

> It will be necessary, said he, to consider the nature of this office . . . [and] in analyzing its properties, we shall easily discover they are not purely of an Executive nature. It seems to me that they partake of a Judiciary quality as well as Executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character . . . .

1 Annals of Cong. 611–12 (J. Gales ed. 1789). Madison concluded from these functions that "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government." *Id.* at 612.[31]

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[31] Later, he reiterated:

> [T]he nature of this office [of Comptroller] differed from the others upon which the House had decided. . . .
>
> Several arguments were adduced to show the Executive Magistrate had Constitutionally a right to remove subordinate officers at pleasure. . . . [B]ut I question very much whether [the President] can or ought to have any interference in the

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The Supreme Court confirmed distinctions like Madison's as a matter of fundamental constitutional law in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). That case concerned, of course, whether William Marbury could mandamus the Secretary of State to provide his commission as justice of the peace for the District of Columbia. In that most historic opinion, Chief Justice Marshall noted, and agreed with, the First Congress's view regarding the Secretary of Foreign Affairs as a tool of the President's will. *Id.* at 165–66. Chief Justice Marshall recognized, in contrast, an entirely different status for Marbury: an officer who, although not an Article III judge (having only a five-year term), nevertheless had been appointed to an office with a fixed term and quasi-judicial functions. *Marbury v. Madison* elaborates regarding the non-removability of such an officer:

> Mr. Marbury . . . was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, *the appointment was not revocable,* but vested in the officer legal rights, which are protected by the laws of his country.

5 U.S. (1 Cranch) at 162 (emphasis supplied).

There is no doubt that Chief Justice Marshall pronounced repeatedly with deliberation and care, as a matter of importance in the case, that a quasi-judicial officer with a fixed term could hold office and "not [be] removable at the will of the executive." *Marbury v. Madison,* 5 U.S. (1 Cranch) at 162; *accord, id.* at 167 ("not removable at the will of the president"). After *Marbury,* the Congress concluded that it could determine whether to confer protections against Presidential removal upon officers with mixtures of judicial and quasi-legislative functions, such as the judges of legislative courts. In *McAllis-*

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settling and adjusting the legal claims of individuals against the United States.

*Id.* at 614.

*ter v. United States*, 141 U.S. 174 (1891), the Court reviewed *Marbury v. Madison* and supported that view.[32]

Thus, in the nineteenth century, both the rulings of this Court, and the Comptroller's relationship with the President, reflected the Framers' understanding of the need for an independent quasi-judicial Comptroller. As Justice Brandeis noted, a review of the extensive statutory history regarding the "[s]teps in [the Comproller's] growth and in the development of [his] control over government expenditures" show that "[t]he decision of the Comptroller General upon the allowance of accounts within his jurisdiction is conclusive upon the executive branch of the government." *United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U.S. 1, 133–34 n.1 (1927).[33]

The lower courts at an early date, and this court in *Kendall v. United States ex rel. Stokes*, 38 U.S. (12 Pet.) 524, 638 (1838), confirmed that Congress could prescribe duties for officers to perform independent of the President's will. *See Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 67 (1884) (independence of quasi-judicial functions).[34] Accordingly, the early Presidents and their At-

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[32] The Court recalled that in *Marbury*, "the chief justice asserted the authority of Congress to fix the term of a justice of the peace in the District of Columbia beyond the power of the President to lessen it by his removal," *id.* at 189. The *McAllister* Court distinguished between statutes in which Congress stated or implied that the President could remove at will the judges of particular territorial courts, and other statutes which precluded removal, noting as to the latter that "it was competent for Congress to prescribe the tenure of good behavior," *id.* at 186.

[33] *Accord, St. Louis, B. & M. Ry. Co. v. United States*, 268 U.S. 169, 174 (1925); *United States v. Harmon*, 147 U.S. 164, 167 (1893). For the nineteenth-century view of the comptroller's quasi-judicial functions, *see, e.g., Murray's Lessee*, 59 U.S. (18 How.) at 272, 280 ("[t]hat the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted"); W.E. Hotchkiss, *The Judicial Work of the Comptroller of the Treasury* (1911).

[34] *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 356, 363 (C.C.D.S.C. 1808) (No. 5,420); *United States v. Smith and Ogden*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,341a). *See* II G.L. Haskins &

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torneys General respected the final and conclusive nature of the Comptroller's independent decisions, disclaiming any power to control those decisions.[35]

2. The Comptroller's 1921 Charter

Late in the nineteenth century, the respect accorded the Comptroller's independence by the early Presidents and Attorneys General was abandoned. In a key incident shaping the provisions of the 1921 Act which are central to this case, President Cleveland used the threat of removal to obtain the subservience of the hitherto independent Comptroller. At first, as Solicitor General Beck described in Congressional testimony, President Cleveland's acting Comptroller had been independent like his predecessors:

> I am told that during the first Administration of President Cleveland, when Mr. Garland was Attorney General, the officer who exercised the powers afterwards conferred upon the Comptroller of the Treasury declined to follow an opinion of the Attorney General.[36]

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H.A. Johnson, *History of the Supreme Court of the United States* 298–304 (1981) (*Gilchrist* case); Grundstein, *Presidential Power, Administration and Administrative Law*, 18 Geo. Wash. L. Rev. 285, 309–21 (1950); note 19 *supra* ("faithful execution" requirements, and account of *Smith and Ogden* case).

[35] Among the Presidents who expressly foreswore control were President Polk and President Jackson, (who wrote on an 1833 report, "[t]he decision of the Second Comptroller is final, over whose decisions the President has no power . . . .") *quoted in* McGuire, *supra* note 28, 20 Ill. L. Rev. at 464; H.C. Mansfield, *The Comptroller General* 99 n.18 (1939) (adding President Tyler to Jackson and Polk). Attorneys General agreed. 1 Op. Att'y Gen. 624 (1823); *id.* 678 (1824); *id.* 705 (1825); 2 *id.* 480 (1831); *id.* 507 (1832); *id.* 544 (1832); 4 *id.* 515 (1846); 5 *id.* 630 (1852) (surveying prior opinions).

[36] Statement of James M. Beck, Solicitor General, at a Hearing of the Committee on the Judiciary of the House of Representatives 24 (May 27, 1924) (hearings unpublished; statement published by the Government Printing Office as a separate print). The details of the incident were separately verified in H.C. Mansfield, *supra* note 35, at 60 & n.97.

There then ensued the nineteenth-century equivalent of the Saturday Night Massacre, only at that time, the threat of Presidential removal succeeded in destroying the officer's independence:

> Mr. Garland brought the matter to the attention of the President, who summoned the officer and told him, in substance, that the Attorney General was the legal adviser of the President and of the heads of the executive departments, and that if the Comptroller was unwilling to be guided by his advice his resignation would be at once accepted. After that interview the Comptroller saw the matter in a different light.

*Id.* Thereafter, "the Comptroller . . . was disposed to follow the opinions of the Attorney General," *id.*, reducing his quasijudicial independence to a mere echo of the departments he was ostensibly checking.

The problem came to a head during the early twentieth-century movement for budget reform, which consistently recognized the traditional functions of the Comptroller General as quasi-judicial.[37] Congress sought to repair the damage that had been done to the Comptroller's independent performance of his checking function. Representative Good, the chief proponent and House manager of the budget reform bills of 1919–21, repeatedly reminded the Congress of the effect of the removal threats made by President Cleveland against the Comptroller.[38] Noting that the reform bills transferred the functions of the Comptroller of the Treasury, and associated auditors, to the Comptroller General, Representative Good followed the historic recognition that such functions

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[37] *See, e.g.*, H.R. Doc. No. 670, 62d Cong., 2d Sess. 404 (1912) (report of Presidential Commission on Economy and Efficiency, key source for the budget reform act) ("It is well known that the duties of the accounting officers of the Treasury, in contemplation of law, are quasi judicial").

[38] 59 Cong. Rec. 8610, 8613 (1920); 61 Cong. Rec. 982 (1921) (Rep. Good) (opening floor statement for the budget bill) (describing President Cleveland incident in detail).

were, as he put it, "semijudicial." [39] To those functions, the reform bills added a second, quasi-legislative function, that of investigating and reporting to Congress regarding expenditure abuse. This function also clearly required independence. As Representative Good elaborated:

> If we allow this official to be removed by the President any time he desires, then that official in the future will not criticize the expending department any more than he has criticized it in the past, and the record is silent practically of any criticism from this source in the past.

61 Cong. Rec. 983 (1921); *see* 59 Cong. Rec. 9245 (1920) (Rep. Andrews).

Accordingly, the committees which reported the budget bill, and the floor proponents, expressed repeatedly their desire to make the Comptroller "independent".[40] The bill as enacted provided for the President to appoint the Comptroller, subject to Senate confirmation, to a fifteen-year term. It included a number of measures to secure independence, including freedom from Presidential removal at will. J.A. 93-95. When the President vetoed one version because of the removability provision, Congress reexamined the matter. Congress dropped the prior provision for removal by two-House concurrent resolution, and instead provided for removal by a public law, enacted with presentation to the President, consistent with the rule this Court later laid down in *Chadha*. The President approved this version, signing it into law without objection. See page 45 *infra*.

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[39] 61 Cong. Rec. 984 (1920) (Rep. Good) ("semijudicial"); *id.* 1079 (Rep. Good) ("semijudicial"); *id.* 1084 (Rep. Fess) ("an element of the judicial").

[40] *See, e.g.*, H.R. Rep. No. 362, 66th Cong., 1st Sess. 9 (1919) ("absolutely independent," "semijudicial"); S. Rep. No. 524, 66th Cong., 2d Sess. 6, 13 (1920) ("independent"); H.R. Rep. No. 1044, 66th Cong., 2d Sess. 13 (1920) (conference report) ("independent").

### 3. *Humphrey's Executor,* Overruling *Myers,* Confirmed The Comptroller's Independence

For a brief period, the sweeping Executive power doctrine of Chief Justice (and former President) Taft in *Myers v. United States* impaired the Comptroller General's independence. *Myers'* holding is not at issue in this case. The essential holding was that the President could remove at will officers with purely executive functions, such as the Secretary of State. As the opinion stated, the President's "cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence [in one] . . . he must have the power to remove him without delay." 272 U.S. at 134. This rule extended to Mr. Myers, the postmaster whose removal was at issue in that case, as an officer whose duties were purely executive, rather than quasi-legislative or quasi-judicial and thus requiring independence.

However, of direct pertinence to the Comptroller was Taft's dictum that removability at will was appropriate, *Myers,* 272 U.S. at 135, even for a comptroller whose actions were quasi-judicial and could not properly be directly controlled or reversed. In Taft's view, "[t]he President may remove the comptroller, [even though] he cannot reverse his decision."[41] Chief Justice Taft recognized that

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[41] Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government,* 25 Yale L.J. 600, 604 (1916); *see* W.H. Taft, *Our Chief Magistrate and His Powers* 81 (1916):

> [C]onsider the drawing of money from the Treasury Department under an appropriation act. The drawing of the warrant must be approved by the Comptroller of the Treasury. It is for him to say how the appropriation act shall be construed and whether the warrant is lawful and whether the money can be drawn. . . . If the President does not like him as a Comptroller, he can remove him . . . but under the act of Congress creating the office, the President cannot control or revise the decisions of this officer. His work is like the work I have referred to, quasi-judicial.

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his view was inconsistent with the previously described doctrine of *Marbury v. Madison*, see page 29 *supra*, and so he attempted to overrule *Marbury* on this point. *Id.* at 139–41 (overruling *Marbury*).

Classic dissenting opinions of Justices Holmes, Brandeis, and McReynolds rebutted the view of Chief Justice Taft. These "Great Dissenters" recognized, as did many commentators, that Presidential removability at will for quasi-judicial officers unsoundly struck at both the independent regulatory commissions and the Comptroller General.[42] They did not rely on "political science preconceptions" of the 1930s, as the challengers would have it, but on extensive constitutional scholarship including thorough surveys of this Court's precedents, the Framers' views, over a century of statutes, Madison's 1789 discussion of the Comptroller and *Marbury v. Madison*.[43]

Only nine years later in *Humphrey's Executor*, the Court reconsidered the *Myers* language regarding officers such as the Comptroller, and expressly overruled it. The President had removed a member of the Federal Trade Commission, and challenged the statute protecting the commissioners from removal at will as unconstitutional. *Myers'* language that officers with quasi-judicial and quasi-legislative functions had to be removable at will—language referring to the comptroller function—was overruled:

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*Compare Myers*, 272 U.S. at 135 ("there may be duties of a quasi-judicial character . . . the discharge of which the President can not in a particular case properly influence or control.").

[42] *Myers*, 272 U.S. at 181, 188 (McReynolds, J., dissenting) (independent regulatory commissions and Comptroller General); *id.* at 262–64 (Brandeis, J., dissenting) (independent regulatory commissions and Comptroller General); *see, e.g.*, Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353, 356–57 (1927).

[43] *Myers*, 272 U.S. at 212–13, 215–20 (McReynolds, J., dissenting) (*Marbury* and legislative courts); *id.* at 242 & n.4, 255–56 n.21 (Brandeis, J., dissenting) (*Marbury*, Madison in 1789 regarding Comptroller).

> The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.

*Id.* at 629. For this point, the Court relied specifically on Madison's statement regarding the Comptroller and *Marbury v. Madison*. *Id.*

Applying this functional analysis, the Supreme Court analyzed the FTC's functions to see if they were quasi-judicial and quasi-legislative (as the opinion itself noted that the Comptroller's function " 'partook of the judiciary quality,' " *id.* (see quotation on page 28 *supra*)). The Court found those qualities evident in the FTC's functions, as they are in the Comptroller General's:

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.

*Id.* at 628. Much as this Court recently recognized with perfectly consistency that "[t]he GAO is an independent agency within the legislative branch that exists in large part to serve the needs of Congress," *Bowsher v. Merck & Co.*, 460 U.S. at 844—for how else can an officer be made sufficiently independent of the Presidential sword of removal—so the *Humphrey's Executor* court recognized the FTC could legitimately perform its functions as an independent "agency of the legislative . . . department[ ] of government." *Humphrey's Executor*, 295 U.S. at 628.

4. *Buckley v. Valeo, Wiener* and Fifty Years of Legislative Consideration Confirm *Humphrey's Executor*

Since every court to consider the GAO's constitututionality up to now has upheld it pursuant to *Humphrey's Executor,* the challengers have mounted an assault on *Humphrey's Executor.* The challengers asserted that its rule has undergone "considerable shifts over the course of time . . . [and that] [i]t is not clear, moreover, that these shifts are at an end." J.A. 68. This assertion misreads this Court's rulings in the 1950s and 1970s and fifty years of legislative consideration.

a. *Wiener* and *Buckley v. Valeo*

*Humphrey's Executor* stated its rule for a unanimous Court, a major feat reflecting the stature of the prior opinions of Justices Holmes and Brandeis in *Myers.* In two major opinions, as well as other minor opinions,[44] this Court has revisited the issue in depth. Each time, the Court has unanimously reaffirmed the rule.

In *Wiener v. United States,* Justice Frankfurter, speaking for a unanimous Court, analyzed a removal by the President of an officer of an independent commission. He began, as the House parties have here, by reviewing the unsoundness of the "short-lived" views on the issue in *Myers,* and the correctness of *Humphrey's Executor. Wiener,* 357 U.S. at 352. The Court then analyzed the removed official's function of deciding claims against government-held funds—a function that, as described above, has been at the heart of the Comptroller's role since 1789. The Court drew the *"a fortiori"* conclusion that it could not "have hang[ing] over the Commission the Damocles' sword of removal by the President." *Id.* at 356.

Most recently, in 1976, the Court revisited the issue in *Buckley v. Valeo.* In reviewing the disputed appointment method for Federal Election Commission members, the Court examined the Comptroller General's status. It re-

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[44] *See Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.,* 333 U.S. 103, 108–09 (1948).

jected the suggestion that he was an "officer of the Congress" like the House Clerk:

> Ranking nonmembers, such as the Clerk of the House of Representatives, are elected under the internal rules of each House and . . . are "officers of the Congress." . . . But . . . the Comptroller General is appointed by the President in conformity with the Appointments Clause.

*Id.*, 424 U.S. at 128 & n. 165 (footnotes and quotations omitted). The Court then reaffirmed that independent agencies could constitutionally perform all their traditional functions. See page 12 *supra*.

b. Fifty Years of Legislative Consideration

*Humphrey's Executor*, like the dissents in *Myers*, built on almost a century and a half of legislative consideration of the need for certain functions to be performed independently. In the fifty years since *Humphrey's Executor*, Congress has continued to give exceptionally close consideration to the issue of independence. This history of careful consideration establishes in the most concrete fashion that the rule of *Humphrey's Executor* represents a vital and living principle in our government rather than, as the challengers would have it, a dated "political science preconception[ ]," J.A. 68.

Since the 1930s, the political Branches have wrestled with a major dilemma of modern regulation: the unavoidable need for federal supervision of an increasingly unified national economy, while keeping at bay the appearance of political manipulation of such extraordinarily sensitive aspects of our society as the broadcast media, monetary policy, and the labor-management balance. Based on *Humphrey's Executor*, Congress, almost universally in legislation with Presidential approval, resolved that dilemma by vesting the quasi-judicial and quasi-legislative regulatory activity, and incidental functions, for some of these sensitive matters in independent regulatory agencies. In setting up the NLRB, for example, Congress concluded:

> The Board as contemplated in the bill is in no sense to be an agency of the executive branch of the Government. It is to have a status similar to that of the Federal Trade Commission, which, as the Supreme Court pointed out . . . is a quasi-judicial and quasi-legislative body. . . . [A provision so stating] is desirable in the light of the decision of the Supreme Court in [*Humphrey's Executor*]. . . .

H.R. Rep. No. 1371, 74th Cong., 1st Sess. 4 (1935).

Moreover, Congress has given intense consideration to the issue of independence in at least five different waves of legislative scrutiny and action over the past fifty years. Each time, it has reaffirmed the basic necessity for independence, while fine-tuning the details to allow Presidents a message of coordination. Soon after *Humphrey's Executor,* President Roosevelt named a Committee on Administrative Management, the Brownlow Committee, to examine, *inter alia,* the independence issue. Its proposal that all the independent commissions be abolished and their functions assigned to executive branch departments [45] was set before the Congress in the Executive Reorganization bill of 1938, and debated extensively. Ultimately, Congress rejected the proposal as involving undue centralization of power in the Presidency,[46] but Congress did give the President's budget office authority to coordi-

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[45] *Separation of Powers and the Independent Agencies: Cases and Selected Readings,* S. Doc. No. 49, 91st Cong., 1st Sess. 371 (1970) (reprinting a Brownlow committee report); L. Fisher, *The Politics of Shared Power: Congress and the Executive* 153, 170–71 (1981); Bernstein, *Independent Regulatory Agencies: A Perspective on Their Reform,* 400 *Annals* 14, 15 (1971); Senate Comm. on Governmental Affairs, 5 *Study on Federal Regulation,* S. Doc. No. 26, 95th Cong., 1st Sess. 14 (1977) ("*Senate Regulation Study*").

[46] The proposal was linked publicly with the ill-fated plan to "pack" this Court, contributing to the sense of excessive centralization of power. *Senate Regulatory Study, supra* note 45, at 16. For a discussion of the debate, see D. Morgan, *Congress and the Constitution: A Study of Responsibility* 188–97 (1966).

nate independent agency budget requests and legislative proposals.[47]

Extensive Congressional consideration continued in the 1940s, 1950s, and 1960s. The First and Second Hoover Commissions issued in 1949 and 1955, respectively, reports regarding the independent agencies.[48] Similarly, in 1960, James Landis, an expert on administrative law, prepared for President-elect Kennedy the "Report on Regulatory Agencies," proposing to correct agencies' "fundamental problems" in part by closer coordination with the White House. S. Doc. No. 49, *supra* note 45, at 1311, 1390–93. Each of these reports brought waves of Congressional hearings, reports, and legislation. Successive Presidents moved to implement these studies by proposing reorganization plans for the independent agencies. Congress responded by reaffirming the independence of the agencies in general, and the FCC, with its sensitive First Amendment mandate, in particular, from political control; however, Congress authorized another measured degree of Presidential coordination, by permitting Presidents to pick the agency chairmen, and, in turn, concentrating authority within the agencies in the chairmen.[49]

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[47] Reorganization Act of 1939, section 201, 53 Stat. 564, 565; *see* L. Fisher, *supra* note 45, at 164; *Senate Regulatory Study, supra* note 45, at 16.

[48] L. Fisher, *supra* note 45, at 171; Bernstein, *supra* note 45, at 16–18.

[49] Congress selectively worked through a large number of reorganization plans, accepting some, and rejecting others. Following the First Hoover Commission Report of 1949, numerous reorganization plans were offered. In 1950 alone, seven reorganization plans involving independent regulatory agenices were proposed; three of the seven were rejected. *See* 96 Cong. Rec. 6886, 7173, 7177 (1950) (rejection of plans for NLRB, ICC, FCC); L. Fisher, *supra* note 45, at 162; 64 Stat. 1264–66 (1950) (plans accepted for FTC, SEC, FPC, and CAB).

In the 1960s, following the Landis report, President Kennedy submitted reorganization plans for seven agencies. Four were accepted, three were rejected. *See* 107 Cong. Rec. 10462, 11003, 13078 (1961) (rejection of plans for FCC, SEC, and FCC); 75 Stat. 837–40 (1961) (plans accepted for CAB, FTC, FHLLB, FMC).

In the 1970s and 1980s came what has been, perhaps, the most extensive consideration of the issue. In 1971, came the report of the President's Advisory Council on Executive Organization, *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies* 116–17 (1971), criticizing agencies' "independence and remoteness in practice" from the President. Congress has chosen not to accept regulatory reform proposals that would end independence. Instead, its regulatory reform proposals have suggested a carefully measured relationship between independent agencies and Presidential orders, and its enactments have further fine-tuned agency independence by vesting the President's budget office with limited control over independent agency information-gathering.[50]

In sum, over the last fifty years, there has certainly been no consensus that centralized Presidential control over quasi-judicial and quasi-legislative regulation of independent agencies' sensitive matters is advisable; *a fortiori,* there has been no consensus that this Court should impose that result by constitutional fiat. Rather, Congress has responded to this period of intellectual and legislative ferment[51] by reaffirming the necessity of independence, while working with the Executive Branch whenever its proposals for adjusting the independent agencies' status have been shown to have practical merit.

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[50] Regarding regulatory reform, *see, e.g., Regulatory Reform Act:* S. Rep. No. 305, 97th Cong., 1st Sess. 65–67 (1981) (proposing carefully measured relationship in light of "the independent agencies['] . . . strong concerns"), which represents only one of a lengthy series of hearings, reports, and floor debates on the matter; regarding enactments, see Regulatory Flexibility Act, Pub. L. No. 96–354, 94 Stat. 1164 (1980); Paperwork Reduction Act of 1980, Pub. L. No. 96–511, 94 Stat. 2812; L. Fisher, *supra* note 45, at 168.

[51] The literature reflecting this ferment is enormous. For an introduction, *see, e.g.,* Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate,* 1984 Wis. L. Rev. 385.

### C. THE COURTS HAVE BEEN CORRECT TO SUSTAIN THE GAO'S CONSTITUTIONALITY

#### 1. Correct Decisions Sustain the *GAO*

As noted, this Court stated that "[t]he GAO is an independent agency within the legislative branch," *Bowsher v. Merck & Co.*, 460 U.S. at 844. In accordance with that view, all three courts to address the question prior to this case have ruled unanimously that GAO could constitutionally perform its traditional functions pursuant to the rule for independent agencies of *Humphrey's Executor.*

As Judge Holtzoff expounded in *United States ex rel. Brookfield Construction Co. v. Stewart,* 234 F. Supp. 94, 99 (D.D.C.), *aff'd,* 339 F.2d 753 (D.C. Cir. 1964), "[u]nlike the heads of most departments and establishments of the Government, [the Comptroller General] occupies a dual position and performs a two-fold function." One function is quasi-legislative: making "investigations of matters relating to the receipt, disbursement and application of public funds, and report[ing] the results of his scrutiny to the Congress," *Id.* at 99. The other was the historic comptroller function, often labeled quasi-judicial as discussed above: "approval or disapproval of payments made by Government departments and other agencies, as well as of settling and adjusting accounts in which the Government is concerned, 31 U.S.C. § 71." *Id.* This Court has repeatedly passed approvingly on the Comptroller General's performance of this latter function. *S & E Contractors, Inc. v. United States,* 406 U.S. 1 (1972); *United States ex rel. Skinner & Eddy Corp. v. McCarl.*

Judge Holtzoff concluded that "[t]he dual status of the General Accounting Office is not anomalous, for many regulatory commissions fulfill in part a legislative function and in part carry out executive duties." *Stewart,* 234 F. Supp. at 99, (citing *Humphrey's Executor).* The two courts that recently upheld the GAO both embraced the "dual nature" analysis, adding their own observations

about the GAO's independence.[52] As Judge Levanthal stated, "[t]he American Constitution accommodates hybrids that work. *E.g.*, the Comptroller General . . . ." *Clark v. Valeo*, 559 F. 2d 642, 664 n.13 (D.C. Cir.) (concurring opinion), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

### 2. The Provision for Removal by Public Law Cannot Impair GAO's Independence

The contention common to the Executive Branch's challenge in all three cases—*Lear Siegler*, *Ameron*, and this one—is that the GAO cannot be independent because the Houses of Congress assertedly control it. That contention is without merit, for two reasons. First, a consideration of the Comptroller General in all his aspects, including the removal provision, shows the absence of Congressional control. Second, the removal provision is severable.

#### a. The Absence of Congressional Control

A number of factors show the absence of Congressional control. At the outset, the Comptroller General is not chosen by Congress. He is chosen by the President, subject to Senate confirmation, like Cabinet members, FTC Commissioners, and federal judges (none of whom, of course, is said to be subject to the control of Congress). *See Buckley v. Valeo*, 424 U.S. at 128 n.165 ("The Comptroller General is appointed by the President in conformity with the Appointments Clause)." The current Comptroller General was appointed by President Reagan in 1981 to serve a fifteen-year term.

Moreover, the courts have consistently found that Congressional influence is completely excluded in the Comp-

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[52] "As already shown, the Comptroller General performs legislative, executive and judicial type functions. It is quite clear that the Comptroller General is the head of an independent administrative agency." *Lear Siegler*, slip op. at 7. The Court "f[ound] that the facts do not bear out [the Executive's] attempt to label the Comptroller General a legislative officer and call his stay function a 'legislative veto.'" *Ameron*, 607 F. Supp. at 973.

troller General's performance of functions such as those required by this Act. "Throughout their brief, the Government characterizes the Comptroller General as a legislative officer who is controlled by the legislative branch. This Court disagrees with that characterization. . . . Congress exercises no influence over the Comptroller General . . . ." *Lear Siegler,* slip op. at 2–3, 11. "[T]he Comptroller General . . . . renders his decisions on bid protests, for example, without interference from the executive or legislative branches." *Id.* at 10–11. "Congress has no involvement whatsoever in the procurement process. Congressional influence is completely excluded from the bid protest process, unlike the legislative veto procedure struck down in *Chadha.*" *Ameron,* 607 F. Supp. at 973. In this case, the Comptroller General submitted to the district court a thorough affidavit describing how he performed his function which amply demonstrated the absence of Congressional influence. J.A. 21.

The district court received no evidence to the contrary, and made no findings to the contrary. It relied solely upon the Executive Branch's argument about the provision for removal of the Comptroller General by a public law. This sixty-five year old provision, never construed or applied, sheds little light on the 1985 Deficit Control Act, and the constitutional issues regarding it will be presented for decision only in a concrete case where a removal occurs. No such removal has occurred. The challengers have strained to reach removal issues in this case, notwithstanding the absence of any specific removal such as the ones underlying *Myers, Wiener,* and *Humphrey's Executor* and notwithstanding the absence of a single word about the GAO removal provision during the legislative consideration of the challenged Act.

The challengers' arguments consist of nothing more than abstract theory and hypotheses. To accept such strained speculation as the basis for this Court to address constitutional issues would allocate to this and other Courts the function of roaming through the code-books

for tangential matters to decide whenever any government agency with an interesting charter is involved; it would "convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government." *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). The House parties join with the Senate's fuller remonstrance against this.

If this Court does, nevertheless, decide to address the 1921 removal provision, the Court should recognize that the provision supports rather than impairs the independence of the Comptroller General. It will be recalled that the President vetoed an early version of the 1921 Act, expressing in his veto message, as his primary concern, *see* 59 Cong. Rec. 8609 (1920) (veto message), his desire for the power to remove the Comptroller at will; *Humphrey's Executor* resolved that issue. The President's secondary concern was the bill's provision for removal by concurrent resolution. *Id.* Congress responded with a provision that removal would occur only after a hearing on specific charges of misconduct, and then only by public law presented to the President. 31 U.S.C. § 703(e)(1)(B)(1982), J.A. 102. As the changes made evidently resolved the concerns of the Presidency, the President signed the 1921 bill without objection.

The President had sound reason to sign that latter version. The removal provision signifies the Congressional intent to protect the Comptroller's independence against encroachment. A Comptroller General can, and should, reliably distinguish his situation from that of officers removable by the President or by resolution of one (or both) Houses. To remove him before the end of his fifteen-year term would require the full application of the legal power of the President and the Congress through enactment of a public law—a far higher measure of protection than other officers have. For the reasons discussed above, Congress could validly provide this added safeguard that removal occur only for cause, and by a public law. Of

course, such a law, because it is presented to the President, fully complies with this Court's doctrine in *Chadha*.[53] Moreover, as an additional safeguard, this Court's doctrines provide that public laws removing individual federal officers have to meet very difficult constitutional standards. *United States v. Lovett,* 328 U.S. 303 (1946). After *Lovett,* the Comptroller General is very secure and independent indeed.

Although plaintiffs and the Executive Branch challenge this Act on its face, as unconstitutional in all circumstances, they rest their challenge on the most extreme of speculations. They contend that after sixty-five years of the provision's disuse, the Comptroller General will become subservient, not merely from a view that Congress might join with the President in a public law removing him for cause, but that Congress would pass an effective law *alone* through an override of a Presidential veto. Obviously, were the Comptroller General even to speculate about that possibility, he would be aware of the constitutional impediments and considerations discussed herein, such as *Lovett,* where Presidential opposition led to the invalidation of a public law terminating the salaries of three federal officers. On the other hand, he will also be aware that a public law has an entirely different status under the Constitution from the mere action of one or both Houses alone.

More fundamentally, however, there has to be a limit to insecurities about removal. It does not appear that a single word of concern about the possibility of passage of

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[53] It is quite clear, for example, that *Myers* had a situation akin to a legislative veto in mind, when it speaks of Congress "draw[ing] to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power," 272 U.S. at 161. *Myers'* dictum talks, of course, about the status of one or both Houses involved in the *Myers* case itself—there, involvement by the Senate alone—rather than the entirely different status of the two Houses and the President in enacting public laws. *See Chadha* (sharply distinguishing the status of one or both Houses acting alone, from their participation in enacting public laws).

a public law by override to remove the Comptroller General was expressed either in 1921 or 1985, and rightly so. The House parties reject the suggestion that this Court should invalidate a major Act of Congress on its face, based on the argument that the Comptroller General lives in subservience because of extremely remote and speculative hypotheticals. There is simply no comparison between the Comptroller's historic independence and the examples of actual Congressional control presented in *Chadha* by the legislative veto and in *Buckley* by the Congressional appointments.[54]

For Appointments Clause purposes, it was agreed by the manager of the 1921 bill, by the President in his veto message, and by the leading contemporaneous commentator, that the Comptroller General could be appointed as an "inferior officer."[55] This Court has held that Congress possesses broad powers to shape the removability provisions for such officers. In *United States v. Perkins*, 116 U.S. 483 (1886) the Court utterly rejected the argument that a removability provision for such officers was "an infringement upon the constitutional prerogative of the Executive," holding instead that the Congress "may limit and restrict the power of removal as it deems best." *Id.* at 485 (quotation omitted).[56]

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[54] The availability of such arguments about asserted control through enactment of public laws has not precluded the rule that "neither the tenure nor salary of [any] federal officers is constitutionally protected from impairment by [public law]," *Glidden Co. v. Zdanok*, 370 U.S. 530, 534 (1962). "[I]n every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws." *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 416 (1850). *See* Comment, 42 Fordham L. Rev. 562, 585–94 (1974) (collecting cases).

[55] 59 Cong. Rec. 8609 (1920) (veto message). The bill manager agreed, 61 Cong. Rec. 982, 1856 (1921) (Rep. Good) ("inferior officer"), as did the leading contemporaneous commentator, Powell, *The President's Veto of the Budget Bill*, 9 Nat'l. Mun. Rev. 538, 539 (1920).

[56] Even the district court so recognized, J.A. 61–62 n.23 (citing *Perkins*).

This is not to argue for such provisions for inferior officers generally. The House parties need not make any such claims, nor need this Court address such a matter, any more than have any of the courts sustaining the GAO. Rather, the provision at issue concerns the single officer with the pivotal function pursuant to the constitutional provision that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. Const., art. I, sec. 9, cl. 7, J.A. 91.

As described above, a powerful constitutional history of British, state, and federal precedents documents the Framers' intent in that Clause, namely that the power of the purse necessarily implied an independent Comptroller to check the Executive. The clause brought forward the experience of colonial legislatures and the House of Commons: that the Executive—be he monarch or President—must not be able to command spending where there has been no appropriation, and so must not control the Comptroller who passes upon such expenditures. Otherwise, the power of the purse, as the people's check on foreign adventures and domestic machinations of the Executive, would be gravely imperilled. The Appropriations Clause draws on three centuries of experience, including unmistakably clear precedents during the 1780s directly on the eve of the Constitutional Convention. See pages 25–33 *supra*. This Court has established that this extraordinary Clause draws special interpretive meaning from historic practice, *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 316–17 (1937), and that it involves particularly strong Congressional prerogatives in separation of powers disputes regarding asserted powers of the other Branches.[57]

Above all, the glaring weakness in the Executive's separation of powers challenge is its inability to quote any specific constitutional prohibitions. This is not a case like

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[57] *See Hart v. United States*, 118 U.S. 62, 66–67 (1886) (Appropriations Clause not overridden by Executive pardon power); *Reeside v. Walker*, 52 U.S. (11 How.) 271 (1851) (Appropriations Clause not overridden by judicial writ).

*Chadha* or *Buckley*, where the Executive points to a specific clause, and offers some express language for this Court to apply. The Executive cannot point to any express language because there is none. The Executive cannot prove that an independent Comptroller does violence to the original intent of the Framers, particularly considering the words of James Madison himself on the subject. Rather, the Executive urges attenuated separation of powers implications patched together from a motley collection of sources. Not a single one of the hundreds of Members who voted either for or against the Act, nor the Executive itself, ever challenged the GAO role during the legislative consideration, leaving uncontested the conclusion of bipartisan proponents that GAO would "wall" off the Congress.

In essence, the Executive seeks for this Court to implement the Executive's preferences by reading the rigid "archaic" view of the separation of powers into the Constitution. This Court has rejected that archaic view repeatedly. See pages 14–17 *supra*. Where, as here, the Constitution imposes no specific prohibition, this Court should leave to the political processes their responsibility for the vast and difficult enterprise of budgeting and governing.

b. Severability

If the removal provision impaired the Comptroller's independence—or if the President had to have inherent power to remove the Comptroller for cause—then the removal provision would be severed. This conclusion results whether the matter is viewed from the perspective of the current Congress which enacted the Deficit Control Act, or from that of the Congress which enacted the 1921 budget reform Act.[58]

In any event, the sounder analysis was that of the court in *Lear Siegler*, slip op. at 5–6, when it stated that "[t]he statutory provisions dealing with the removal of

[58] The House parties join in the fuller treatment of the Senate and the Comptroller General on these issues.

the Comptroller General also cut against the Government's claim that the office is controlled by Congress . . . . [A]s the legislation itself demonstrates, the Comptroller General is an officer independent of both the executive and legislative branches." No other officer (outside the Article III judiciary) has the security provided by the requirement for the Comptroller's removal, not merely of an action of the President alone or one or both Houses of Congress alone but of a public law passed by the President and Congress based on specific charges of misconduct. Three centuries of Anglo-American history have shown the necessity for an independent Comptroller, and this Court's doctrines have upheld Congress' authority to safeguard that function.

## CONCLUSION

No constitutional provision supports the facial challenge to this Act. In its intent to "wall" off the function at issue from Congress and the President, the Act draws strength from a uniquely powerful constitutional history of an independent Comptroller. This Court should allow the political Branches to work their will with the intractable national problem of the deficit. The Act should be upheld.

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